

alleged to have been abandoned prior to the shipping date of any of the shipments which were seized. Their abandonment after shipments were made could constitute no defense to the allegation of misbranding, since under the Act misbranded drugs may be seized at any time after they are shipped in interstate commerce. 21 U. S. C. A. 334. Therefore, the motion to strike the second defense will be sustained as the pleadings now stand. However, I believe that if the answer were amended to show that the abandonment of dissemination of the booklets took place before the date of some or all the shipments, this would be a good defense, at least conditionally, as to those shipments which were subsequent to the abandonment. I say conditionally, because it is only to the extent that the abandonment of such dissemination creates an inference that the shipper did not intend, when it shipped the drugs in interstate commerce, that they be used for the treatment of the diseases named in the booklets, that the abandonment can be said to be effective as a defense. The government might introduce evidence to show that, notwithstanding such abandonment, it was still the intention of the shipper that the drugs be used for the treatment of the diseases mentioned in the booklets; but in the absence of such proof, it is my opinion that the abandonment would warrant the inference that there was no intent to misbrand as to drugs shipped thereafter.

"One of the arguments advanced by claimant is that since the Federal Trade Commission has been given authority by Congress to prevent false advertising, whereas such authority has been denied to the Food and Drug Administration, it should be held that the Federal Trade Commission is the only agency of government which can operate in this field. But it is well settled that the action of either of these agencies—that of the Food and Drug Administration relative to misbranding, and that of the Federal Trade Commission relative to false advertising—is not the exclusive remedy afforded to the government in a case where both misbranding and false advertising are present. In other words, the fact that the government may seize an article because it is misbranded does not prevent the Federal Trade Commission from issuing a cease and desist order with reference to false advertising concerning that article; and conversely, the issuance of a cease and desist order does not prevent the government from proceeding against the article because of the misbranding. *United States v. 5 Cases of Capon Springs Water*, (C. C. A. 2, 1946) 156 F. (2d) 493; *United States v. Research Laboratories*, (C. C. A. 10, 1942) 126 F. (2d) 42, Cert. denied 317 U. S. 656.

"An order may be entered in accordance with this opinion."

On April 14, 1949, pursuant to the above opinion, an order was entered granting in part and denying in part the Government's motion to strike. On January 9, 1950, a request for admissions of certain facts was served by the Government upon the claimant, pursuant to Rule 36 of the Rules of Civil Procedure; and on March 20, 1950, an answer to the request was submitted. Thereafter, motions for summary judgment were filed on behalf of the Government and the claimant. On February 5, 1951, it appearing to the court that there existed no genuine issue as to any material fact, an order was entered denying the claimant's motion and granting the Government's motion for summary judgment, and ordering that the products be condemned and destroyed.

An appeal taken to the United States Court of Appeals for the District of Columbia was dismissed on or about June 18, 1952. On July 1, 1952, the products were destroyed.

3768. Misbranding of Vigorettes. U. S. v. 169 Dozen Bottles, etc. (F. D. C. No. 33251. Sample Nos. 8418-L, 8419-L.)

LIBEL FILED: May 15, 1952, Western District of New York.

ALLEGED SHIPMENT: Between the approximate dates of March 24 and May 1, 1952, from Cleveland, Ohio.

PRODUCT: 672½ dozen bottles of *Vigorettes* at Buffalo, N. Y., in possession of Vigorettes, Inc., together with a number of display posters entitled "Now! New! More Potent Vigorettes" which were printed locally. The bottles were of various sizes, containing 30, 60, 90, 200, and 500 "capsulettes."

LABEL, IN PART: (Bottle) "Vigorettes Improved Added Potency Each Vigorette Capsulette Contains: Vitamin B₁ (Thiamine Hcl.) USP 5 mg., Vitamin B (Riboflavin) USP 5 mg., Vitamin B (Pyridoxine Hydrochloride) 0.5 mg., Vitamin C (Ascorbic Acid) 30 mg., Niacinamide USP 50 mg., Calcium Pantothenate 10 mg., Folic Acid USP 0.1 mg., Liver Desiccated NF 275 mg., Ferrous Gluconate (Equivalent to 20 mg. of Iron) 194.4 mg., Choline (Bitartrate) 15 mg., Inositol 10 mg., Vitamin B₁₂ (from streptomycetes fermentations) 5 mcg., dl-Methionine 5 mg., Vitamin E 31 U., Iodine (from potassium iodide) 0.1 mg., Manganese (from manganese glycerophosphate) 1 mg., Cobalt (from cobalt sulfate) 0.1 mg., Zinc (from zinc sulfate) 1 mg., Magnesium (from magnesium sulfate) 2.5 mg., Potassium (from potassium sulfate) 2 mg., Molybdenum (from sodium molybdate) 0.2 mg. * * * Dosage Adults: 1 or 2 Capsulettes daily."

NATURE OF CHARGE: Misbranding, Section 502 (a), certain statements in the posters accompanying the article were false and misleading. The statements represented and suggested that the article when used as directed was effective in the treatment of anemia, nervousness, weakness, tiredness, poor digestion, heart trouble, migraine headaches, insomnia, tooth decay, pernicious anemia, coronary disease, and sterility, and that use of the article would insure better blood, steadier nerves, stronger and longer life, resistance to disease, better growth, healthy heart, healthy gums and teeth, pliant joints, healthy skin, good digestion, healthy liver, and proper muscle growth and tissue function. The article when used as directed was not effective in the treatment of such conditions, and it was not capable of fulfilling the promises of benefit made for it.

Further misbranding, Section 502 (c), the information required by Section 502 (e) (2), to appear on the label of the article, namely, the common or usual name of each active ingredient contained therein, was not prominently placed on the label with such conspicuousness (as compared with other words, statements, designs, or devices in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use since it failed to distinguish between the active and inactive ingredients; and, Section 502 (f) (1), the labeling of the article failed to bear adequate directions for use for the purposes for which the article was intended.

The article was alleged to be misbranded in the above respects while held for sale after shipment in interstate commerce.

DISPOSITION: May 16, 1952. Vigorettes, Inc., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be released under bond for relabeling, under the supervision of the Federal Security Agency, and that the posters be destroyed.

3769. Misbranding of Scientific Massage Modality devices and Stim-U-Lax Junior devices. U. S. v. 19 Devices, etc. (F. D. C. No. 32237. Sample Nos. 16400-L, 16401-L.)

LABEL FILED: On or about December 18, 1951, Western District of Missouri.